IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8849 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL Sd/-
and
Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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JAYANTILAL NATHALAL SHETH

Versus

STATE OF GUJARAT

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Appearance:

MR AMIT M PANCHAL for Petitioner
MR K.T DAVE, AGP. for Respondent Nos. 1 & 2
MR MUKESH R SHAH for Respondent Nos. 3 & 4.
MR BS PATEL for Respondent No. 5

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CORAM : MR.JUSTICE B.C.PATEL
and
MR.JUSTICE D.A.MEHTA

Date of decision: 22/06/2001

CAV. JUDGEMENT

(Per : MR.JUSTICE D.A.MEHTA)

1. This petition under Article 226 of the Constitution of India challenges the orders issued by the Revenue Depatrtment, Government of Gujarat and the Collector, Sabarkantha on 3/4/1998 and 11/5/1999 respectively whereby it is ordered to hand over possession of a portion of public road to certain persons by charging some amount for construction of pucca cabins on the said road. The aforesaid orders are challenged as being arbitrary, unreasonable, irrational and illegal in view of the fact that the proposed 89 cabins are to be constructed on a public road which does not have even a foothpath to walk and the land on which the road is situated has vested in the Modasa Nagar Palika as per the provisions of the Gujarat Municipalities Act, 1963. It is further stated in the petition that if the proposed construction of 89 cabins on the public road is permitted it would cause public nuisance and traffic problems, that the impugned orders have been issued without inviting objections from the general public and without following any procedure for disposal of public land i.e. by way of inviting offers from general public or putting to public auction, that the entire action is thus opposed to public policy and does not have public good and welfare as basis and goes against the public interest, that the orders are issued in colourable exercise of jurisdiction for the purpose of abuse or misuse of power and by such action public property, viz. the public road is being frittered away. It is further averred that there are under ground utilities such as drainage, water supply, telephone and electric supply cables which would be affected causing disruption of various public amenities. It is further stated that there is "Ancient Wav" which is about 500 years old and is a protected monument under Ancient Monuments and Archealogical sites and Remains Art, and accordingly no permanent construction is permissible upto distance of 100 mtrs. as per provisions of the said Act. It is, therefore, prayed that :-

"(A) Your Lordships may be pleased to issue a writ of Mandamus or a writ in the nature of Mandamus and/or any other appropriate writ, direction or order, quashing and setting aside the order dated 3.4.1998 at Annexure - A and the order dated 11.5.1999 at Annexure - B;"

2. The following undisputed facts emerged from the affidavit-in-reply filed on behalf of respondent No.3 i.e. Modasa Nagarpalika. That prior to 1963 Modasa was having Modasa Municipality and was governed by the Bombay

Municipalities Act. Thereafter, it was converted into Nagar Panchayat. However, prior to the Nagarpalika coming into existence, erstwhile municipality permitted the persons belonging to Sindhi community to put-up kacha cabins for the purpose of their rehabilitation and re-employment as per the Government circulars issued under the policy of resettlement of displaced persons by the Government in the year 1958. That the municipality has been recovering rent from such persons regularly since then. That, somewhere in 1985 the cabin holders represented through their association seeking permission of the Nagarpalika for construction of pucca shops in place of kacha cabins and accordingly by resolution No.96 dated 26/8/1985, a resolution was passed by the Nagarpalika to invite objections for regularising the said kacha cabins which were situated in the gamtal on public road. In view of the fact that no objections were received by the Nagarpalika the General Body by resolution No.133 dated 1/11/1985 resolved to forward a proposal to the State Government for the aforesaid purpose and accordingly a proposal was sent to the Collector, Sabarkantha.

3. In the meantime it appears that on 8/10/1986, the Nagarpanchayat was converted into Nagarpalika and an Administrator was appointed and during the tenure when the Administrator was in charge, the aforesaid kacha cabins were removed. However, the Nehru Marg Cabin Owners Association approached this Court by way of Special Civil Application Nos. 4019/87, 4020/87, 4196/87 and 4197/87. It further appears that by way of an interim order Nagarpalika was permitted to restore the cabins. That, thereafter the writ petitions filed by the association came to be disposed of by this Court on 1/10/1987 whereby the Court passed the following order in view of the note filed by the respondent municipality before this Court. The said note as referred and the final order of this Court are reproduced hereunder for ready reference :

" xxx xxxx It is stated that appropriate proceedings would be taken including serving the concerned petitioners with notice, and after giving hearing to those of the petitioners who desire to be heard, proper orders would be passed in accordance with law. Till such orders are passed, the cabins in question would not be removed"

xxx xxx xxx xxx

"In the facts and circumstances of the case and in view of the concession made by the learned Counsels for the respondents, the following directions are given :

(i) The respondent authorities shall not take any action of removal of the petitioners from the business premises occupied by them without affording them an opportunity of being heard :

(ii) Such opportunity of being heard would also include :

(a) notice in writing to be served upon each of the occupant, calling upon him to show cause as to why he should not be removed from the place in question;

(b) the occupant concerned shall be afforded an opportunity of leading evidence in response to the notice; and

(c) the occupant concerned shall be afforded an opportunity of being heard in person either by himself or through an advocate;

(iii) In case the respondent - authorities, after the enquiry as stated hereinabove, come to the conclusion that the occupant concerned is required to be removed from the place, and any decision adverse to the occupant is taken, the same shall not be implemented for a period of one month from the date of communication to the occupant;

(iv) The order that may be passed by the respondent-authorities shall be served upon the occupant preferably by registered A.D.Post. The same shall also be sent by an ordinary post under certificate of posting and the order shall also be affixed on the premises in question.

7 In the instant case it is stated on behalf of the petitioners that it is possible to regularise the occupation of the petitioners at the places where they are carrying on their business. If that

be so, I hope and trust that the respondent-authorities will consider their requests favourably. If it is not possible to regularise their occupation at the place where they are carrying on the business, their request for giving alternative accommodation shall also be considered by the respondent-authorities with due sympathy.

8 With the aforesaid observations and directions, the petitions stand disposed of. Rule discharged with no order as to costs."

4. The concerned persons/cabin holders were given hearing by the Nagarpalika and it appears that a decision was taken to regularise their occupation and permit construction of pucca shops and forward a proposal to the said effect. Accordingly on 22/1/1998 the Town Planning Officer, Himmatnagar, sent proposal/recommendation for allowing the construction of pucca shops in place of old kacha cabins. It appears that thereafter the Collector, Sabarkantha, after carrying out requisite formalities forwarded the proposal to the State Government and the State Government on 3/4/1998 passed the impugned resolution at Annexure "A" and in pursuance thereto the Collector, Sabarkantha has passed the order dated 11/5/1999 being the consequential order imposing the condition as to making necessary payment as per market price etc. It is these two orders of respondent no.1 and respondent 2 respectively which are under challenge in the present petition.

5. From the facts which have come on record there is admittedly no dispute that Negru Marg in the town of Modasa is a public road and the kacha cabins are situated on the said road and were sought to be removed by the Administrator in 1986. The entire exercise undertaken by the Modasa Nagarpalika, the Collector, Sabarkantha and the Revenue Department of the Government of Gujarat is based solely on the order dated 1/10/1987 passed by this Court in the group of Special Civil Application Nos. 4019/87, 4020/87, 4196/87 and 4197/87 whereby the observations made by this Court in para 7 have been taken as the direction issued by the Court and refuge is taken on the said ground for carrying out the activity which is otherwise not permissible in law. As can be seen from para 7 of the aforesaid order of this Court, a submission was made on behalf of the petitioners in the said group

of petitions that it is possible to regularise the occupation of the petitioners at the place where they are carrying on their business and in context of this submission, this Court observed on the premises that the submission was correct, " if that be so, I hope and trust that the respondent-authorities will consider their request favourably. If it is not possible to regularise their occupation at the place where they are carrying on the business, their request for giving alternative accommodation shall also be considered by the respondent authorities with due sympathy". Therefore, there is no direction issued by this Court which would necessitate that the authorities should permit legalisation of encroachment on a public property.

6. To the contrary, the effective directions issued by this Court specify that the affected persons shall not be removed without being afforded an opportunity of being heard, and after such hearing is concluded if the occupants are to be removed such adverse decision shall not be implemented for a period of one month from the date of communication of such order to the occupants. The Court has further gone on to state that the order that may be passed by the respondent authorities shall be served preferably by Registered Post Acknowledgement Due, a copy also be served by ordinary post under certificate of posting and further that the order shall also to be affixed on the premises in question, thus, ensuring that an adverse order may not be challenged by any person on the ground that the order was not properly served. On reading of the entire order it is apparent that this Hon'ble Court was aware and conscious of the legal position and the Court has nowhere directed any of the authorities to act against any provisions of law.

7. The affidavit-in-reply filed on behalf of the respondent no.2 i.e. Collector, Sabarkantha specifically states in para 2 that "this whole exercise is made as per the direction of the Hon'ble Court passed in Special Civil Application nos.4019, 4020, 4196 and 4197 of 1987. At para 7 of the same judgment it has been observed by the Hon'ble Court that "xxx xxx Therefore the Collector as well as the Government has passed the orders and the final order granting the land is based on the judgment of the Hon'ble Court. This Hon'ble Court may pass appropriate order in the facts and circumstances of the case".

8. Therefore, on reading of the affidavit of respondent no.2 it is amply clear that the State Government as well as the respondent authorities have

undertaken the entire exercise under the guise of following the order of this Hon'ble Court and the recommendations which were made in passing have been treated as directions and the action is sought to be defended on the basis of such direction. As we have already seen the order of this Hon'ble Court has nowhere issued any such direction and therefore the entire exercise is illegal, arbitrary and beyond the provisions of law and is vitiated as the same is based on extraneous and irrelevant considerations.

9. The action of forwarding the proposal by the Modasa Nagarpalika is also based on the same premises. An additional contention has been raised in the affidavit-in-reply, whereby it is stated that the Nagarpalika has been able to recover the arrears of rent from the cabin holders as well as it has been able to obtain a sum of Rs. 9 lacs by way of development charges to compensate the loss which would be caused to the Nagarpalika by way of allotment of land for construction of shops. It is further averred in the said affidavit-in-reply that municipality has already recovered an amount of Rs.10,35,000/- from the cabin holders under the head of "LOKFALO" and the said amount is to be used for providing public amenities. An argument was advanced on the basis of this at the time of hearing on behalf of the Nagarpalika that the entire process has now become irreversible and the Court should not interfere as the entire exercise has benefited the Nagarpalika financially and simultaneously public at large is not likely to suffer as the funds received by the Nagarpalika shall be utilised for the purpose of providing amenities to the public.

10. In sofar as encroachment on public property is concerned, a Division Bench of this Court in the case of Peoples Union for Civil Liberties & Anr. Vs. State of Gujarat & Ors. reported in G.L.R.2001(1) 547 (Guj.) has stated thus:

> "No one has a fundamental right to encroach upon public property and to put up dwelling units on the public footpath, public road or public place. Right to enjoy property which belongs to public at large belongs to every one and that right is to be exercised in the manner as prescribed. For example, no one can put up a hut to reside in a public garden saying that a garden is open to all."

10.1 In relation to the powers of the Government, the

Apex Court has observed in the case of A.P.Aggarwal Vs. Govt.of N.C.T.of Delhi in (2000)1 S.C.C. that :

"11. In our opinion, this is a case of conferment of power together with a discretion which goes with it to enable proper exercise of the power and therefore it is coupled with a duty to shun arbitrariness in its exercise and to promote the object for which the power is conferred which undoubtedly is public interest and not individual or private gain, whim or caprice of any individual. xxx xxx xxx "

"12. It is well settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution and basic to the rule of law, the system which governs us (vide Shrilekha Vidyarthi v. State of U.P.)".

10.2 Similarly in the case of Consumer Action Group and Another v. State of T.N. and Others, reported in (2000) 7 S.C.C.425 it is stated thus :

" When such a wide power is vested in the Government it has to be exercised with greater circumspection. Greater is the power, greater should be the caution. No power is absolute, it is hedged by the checks in the statute itself. Existence of power does not mean to give one on his mere asking. The entrustment of such power is neither to act in benevolence nor in the extra-statutory field. Entrustment of such a power is only for the public good and for the public cause. While exercising such a power the authority has to keep in mind the purpose and the policy of the Act and while granting relief has to equate the resultant effect of such grant on both, viz. the public and the individual. So long as it does not materially affect the public cause, the grant would be to eliminate individual hardship which would be within the permissible limit of the exercise of power. But where it erodes the public safety, public convenience, public health etc. the exercise of power could not be for the furtherance of the purpose of the Act. Minor abrasion here and there to eliminate greater hardship, may in a given case, be justified but in no case affecting the public at large. So every time the Government exercises its power it has to examine and balance this

before exercising such a power. Even otherwise, every individual right including fundamental right is within reasonable limit but if it makes in roads into public rights leading to public inconvenience it has to be curtailed to that extent. So no exemption should be granted affecting the public at large. Various development rules and restrictions under it are made to ward off possible public inconvenience and safety. Thus, whenever any power is to be exercised, the Government must keep in mind, whether such a grant would recoil on the public or not and to what extent. If it does then exemption is to be refused. If the effect is marginal compared to the hardship of an individual that may be considered for granting".

xxx xxxx xxx xxx xxx xxx xxx xxx

"Whenever any statute confers any power on any statutory authority including a delegatee under a valid statute, howsoever, wide the discretion may be, the same has to be exercised reasonably within the sphere that the statute confers and such exercise of power must stand the test of judicial scrutiny xxx xxx xxx "

10.3 As regards the powers of the municipality, in the case of M.I.Builders v. Radhey Shyam Sahu and others reported in (1999) 6 S.C.C. 464, the Apex Court has stated thus :

" xxx xxxx (1) the agreement is a fraud on power, prime land has been given for a song by the Mahapalika. The fact that the scheme was so lucrative could be seen from the fact that all the shops less 5% were booked within six days of the advertisement appearing in December 1993. Public interest and the public exchequer have been sacrificed. The Mahapalika is divested of its control over the project though notionally not for ever but the builder, on the other hand, has control over the project for all times to come, and (2) construction is in contravention of the provisions of law as contained in the Development Act. The project has been entrusted to the builder in violation of the provisions of the Act. The decision taken by the Mahapalika was not on proper consideration and was not an informed objective decision. Judicial review is permissible if the impugned action is against law

or in violation of the prescribed procedure or is unreasonable, irrational or mala fide. xxx xxx xxxx xxxx By allowing the construction the Mahapalika had deprived its residents as also others of the quality of life to which they were entitled under the Constitution and the Act. The agreement smacks of arbitrariness, unfairness and favouritism. The agreement was opposed to public policy. It was not in public interest. The whole process of law was subverted to benefit the builder. The Mahapalika and its officers forgot their duty towards the citizens and acted in a most brazen manner. xxx xxx xxxx xxxx No consideration should be shown to the builder or any other person where construction is unauthorised. This dicta is now almost bordering the rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial discretion in moulding the relief. Such a discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorised construction, if it is illegal and cannot be compounded, has to be demolished. There is no way out. Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing the robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion wherever it is required to be exercised has to be in accordance with law and set legal principles xxx xxx xxx "

11. The contention of the municipality that they have already recovered an amount from the cabin holders by way of "LOKFALO" or development charges and hence have acted in public interest requires to be rejected on the basis of aforesaid principles. Suffice it to state that the said action cannot be the criteria for permitting perpetration of an illegality committed. In fact there is no provision in law which would permit the municipality to collect such an amount and if that be so the decision of the Apex Court in the case of Ahmedabad Urban Development Authority v. Sharadkumar Jayantikumar Pasawala & Ors. reported in 1993(1) G.L.R. 655, would apply.

" It appears to us that in a fiscal matter it will not be proper to hold that even in the

absence of express provision a delegated authority can impose tax or fee. In our view, such power of imposition of tax and/or fee by delegated authority must be very specific and there is no scope of implied authority for imposition of such tax or fee. It appears to us that the delegated authority must act strictly within the parameters of the authority delegated to it under the Act and it will not be proper to bring the theory of implied intent or the concept of incidental and ancillary power in the matter of exercise of fiscal power".

11.1 Thereafter, a question would arise as to what would happen to the funds collected by the municipality from the cabin holders. The Supreme Court in the case of M/s.Shiv Shanker Dal Mills etc.etc. v. State of Haryana and others etc., reported in A.I.R. 1980 S.C.1038 has stated as under :

"Where public bodies, under colour of public laws, recover people's moneys, later discovered to be erroneous levies the dharma of the situation admits of no equivocation. There is no law of limitation, especially for public bodies, on the virtue of returning what was wrongly recovered to whom it belongs. Nor is it palatable to our jurisprudence to turn down the prayer for high prerogative writs, on the negative plea of "alternative remedy", since the root principle of law married to justice, is ubi jus ibi remedium."

12. Therefore, applying dicta laid down by various decisions it becomes apparent that the entire exercise commencing from the representations made by the Cabin Owners Association, forwarding of proposal by the municipality after passing the resolution and culminating in the orders of the State Government and the Collector, Sabarkantha is bad in law as being against public interest and opposed to public policy. It appears that the entire exercise was with a view to favour certain individuals and thus is unfair to the public at large and the encroachment on a public road would never be in the interest of public. There is another aspect which requires to be taken into consideration. In case the pucca shops are permitted to be constructed on the public road it would result in reduction of width of the road, which in turn would create traffic problems; the shop owners and their employees as well as customers visiting the shops would park their vehicles in front of the shops

and thus create obstruction to the traffic movement on the road. A further consequence would be that such dense traffic would as a resultant effect create air pollution and also noise pollution. Hence, even from this angle the action of the authorities is bad in law as being against public interest and public policy.

13. The amount which has been collected by the municipality for disposal of the land which belongs to the municipality is ordered to be refunded to the cabin holders who had made payment within a period of eight weeks from today with interest at the rate of 12% p.a.

14. It is clear therefore that the respondent nos. 1, 2 and 3 have acted without jurisdiction and/or in excess of jurisdiction and their acts are not supported under any provisions of law, though they have purported to follow and apply the direction of this Hon'ble Court; as already discussed no such direction has been issued by this Court and therefore the impugned orders dated 3/4/1998 and 11/5/1999 issued respectively by the respondent nos. 1 and 2 are hereby quashed and set aside. We may make it clear that the recommendation made by the learned Single Judge would yet survive and the respondent municipality may after giving reasonable opportunity to the cabin holders relocate them, if possible. The petition is accordingly allowed. Rule made absolute with no order as to costs.

Sd/- Sd/-
(B.C.Patel, J) (D.A.Mehta, J)
m.m.bhatt